No. 80-894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BECKER'S MOTOR TRANSPORTATION, INC., and NEEDHAM'S MOTOR SERVICE, INC., Debtors,

Petitioners,

vs.

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

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The government, in its Memorandum In Opposition to the Petition herein, has unilaterally and without supporting citation announced that the 1978 Bankruptcy Code has effected two significant and far-reaching revisions in bankruptcy law:

(1) We are told that pre-petition tax penalties are discharged when a plan of reorganization is confirmed, and

(2) We are assured that post-petition interest on tax claims is not allowable, and will therefore be discharged. Respondent's Memorandum at pp. 3-4.

These two propositions, announced by the government through an off-the-cuff interpretation of 11 U.S.C. §1141(d)(1), and without post-Code citation or allusion to legislative history, constitute significant departures from prior law.[1]

By asserting these conclusions in its Memorandum,[2] the government devilishly seeks to tempt this Court with the sweet fruit of the mootness of this Petition. The government would have this Court conclude that the 1978 Bankruptcy Code has settled the issues sought to be reviewed by petitioners. It is respectfully submitted that the government is incorrect and that the mootness temptation should be resisted for two reasons.

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[1] As the government clearly acknowledges, (Resp. Mem., p. 3), an established line of decisions of this and other Courts has held that such penalties and interest may survive discharge. *See, e.g., Bruning* v. *United States,* 376 U.S. 358 (1964); *Nicholas* v. *United States,* 384 U.S. 678 (1966); *Hugh H. Eby Co.* v. *United States,* 456 F.2d 923 (3d Cir. 1972); *In re Johnson Electrical Corp.,* 442 F.2d 281 (2d Cir. 1971); *In re Jaylaw Drug, Inc.,* 621 F.2d 524 (2d Cir. 1980).

[2] In stark contrast to Regulations, Revenue Rulings, acquiscences, determination letters and ruling letters, with their varying levels of reliability for taxpayers, *see generally* I.R.C. §7805(b); Rev. Pro. 80-20, 1980-1 C.B. 633, the government's stated position herein is not binding on the IRS. *See, e.g., Barrett* v. *Commissioner,* 42 T.C. 993 (1964), *aff'd* 348 F.2d 916 (1st Cir. 1965). It is inconceivable that the official IRS position in all future corporate Chapter 11 cases will be that tax penalties are discharged and post-petition interest on taxes cannot be obtained by the government.

First, the government's bald declaration of "new law" by stating its own views of the interpretation of a statute is clearly overly simplistic. An analysis of whether or not the drafters of the Code intended the result the government suggests requires careful analysis of not only 11 U.S.C. §1141, but also its interaction with 11 U.S.C. §502 (allowance of claims provisions), and 11 U.S.C. §523 (individual debtor's discharge provisions),[3] the legislative history of the Code, its codification or departure from prior law, case law, and commentary. It is respectfully suggested that this Court not accept as indisputable the government's hasty and unsupported view of the law.

Second, even if it is assumed, *arguendo,* that the government's view of the law as it is now enunciated in the Code is correct, then further confusion as to the state of the law exists, and clarification is required. How did the law reach the state in which the government finds it? Only two courses suggest themselves. On the one hand, it may be that the Code merely *codifies* prior law, in which case the decision below permitting the government to collect prepetition penalties and post-petition interest was erroneously decided, and the grant of *certiorari* to review that decision is mandated. On the other hand, it may be said that the Code substantially *departs* from prior law on these issues of dischargeability and allowability. However, relevant legislative history does not suggest such a radical change has taken place.[4]

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[3] Involved issues are presented by the statutory scheme, including a comparison of differing treatment of tax claims as between corporate and individual debtors. Compare the complete discharge of penalties for the corporate debtor that the government suggests in its Memorandum with the partial non-dischargeability of such penalties in the case of an individual. 11 U.S.C. §523(a)(7).

[4] *See* 124 Cong. Rec. H 11,105 (Sept. 28, 1978), S 17,422 (Oct. 6, 1978), *reprinted in* [1978] 5 U.S. Code Cong. & Ad. News 6478, 6547.

Accordingly, it is respectfully submitted that the government has taken a broad brush and painted a distorted picture of the interaction of the tax and bankruptcy laws. The serious issues in this area highlighted in our petition are real, subsisting concerns, as manifested by the conflicts between Circuits. For these reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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